IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

TUESDAY, THE 6TH FEBRUARY 2007 / 17TH MAGHA 1928

CRL.A.No. 2067 of 2003(C)

ST.963/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, THRISSUR

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APPELLANT/COMPLAINANT:

N.R.SUBASH, S/O. NJATTUVETTY RAGHAVAN,
PERINGOTTUKARA P.O., THRISSUR.

BY ADV. SRI.DILIP J. AKKARA

RESPONDENTS/ACCUSED & STATE:

1. A.S.DIVAS, S/O. ALAKKAL SUKUMARAN,
   NATTIKA P.O., THRISSUR.

2. STATE OF KERALA REP. BY THE
   PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.P. Balachandran, J.

Crl.A.No. 2067 of 2003

JUDGMENT

The complainant in a complaint filed under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the Act') against the first respondent is the appellant, he being aggrieved by the acquittal of the first respondent by the court below of the offence under Section 138 of the Act under Section 255(1) Cr.P.C.

2. The appellant filed complaint in the court below complaining of commission by the first respondent/accused of an offence punishable under Section 138 of the Act alleging that the first respondent borrowed an amount of Rupees forty six thousand from him; that in discharge of the said loan he issued Exhibit P1 cheque dated 23.5.1999 for Rupees forty six thousand; that on presentation of the cheque for encashment, it was dishonoured on

19.7.1999 under Exhibit P2 memorandum; that consequently, the original of Exhibit P3 notice was issued to the first respondent under Exhibit P4 postal receipt and it was received by the first respondent under Exhibit P5 postal acknowledgment card, but, he has not cared to pay up the amount covered by the cheque either within the statutory period or ever thereafter, but has only issued Exhibit P6 reply notice and thereby he has committed an offence punishable under Section 138 of the Act.

3. On appearance of the first respondent in the court below, pursuant to the issuance of summons, he pleaded not guilty on being questioned, reading over the particulars of the offence and explaining it to him. Consequently, a trial of the case was conducted. Complainant got himself examined as PW1 and got marked Exhibits P1 to P6. On the complainant closing his evidence, the first respondent was questioned under Section 313 Cr.P.C.

Thereupon, he generally denied all incriminating circumstances appearing in evidence against him and maintained that he is innocent.

4. According to the first respondent, the appellant was conducting Lakshmi Chits & Finance at Triprayar, wherein he joined for a kuri, the monthly instalment of which was Rs.2,500/- and he paid upto twenty five instalments at the rate of Rs.2,500/- and the appellant has to pay an amount of Rs.62,500/- to him; that while so, he approached the appellant to advance him an amount of Rupees five thousand for marriage purposes; that then the appellant received a blank signed cheque leaf from him and that the complaint is filed misusing the said cheque. A passbook, admittedly issued by Lakshmi Chits & Finance, of which, the appellant is a partner, in the name of the first respondent, is produced by him and is marked as Exhibit D1 and it is admitted by the appellant. However, though the passbook was admitted, when the appellant was

cross-examined in the court below, it was produced only later and the appellant was not afforded any opportunity to have his say as regards Exhibit D1. Arguments were advanced on behalf of the first respondent in the court below on the basis of Exhibit D1 that twenty five instalments are paid up in the said kuri; that an amount of Rs.65,000/- is due to him; that the said amount is not paid and it was, while so, that he received an amount of Rupees five thousand for marriage purposes from the appellant, on whose instance a blank signed cheque leaf was issued, which according to the first respondent, has been misused by the appellant for the purpose of instituting the present complaint.

5. All the same, PW1 has admitted in cross-examination that he was conducting Lakshmi Chits & Finance at Triprayar, but he has stopped that business now; that the first respondent has subscribed for a kuri for an amount of Rupees one lakh; that he prized the kuri and received the

amount and he paid up all amounts due thereunder, though, according to him, the records thereof might be at his residence. On the basis of absence of any entry in Exhibit D1, regarding prizing of the kuri by the first respondent and receipt of the amounts due thereunder and the payment of the subscriptions upto the last instalment in Exhibit D1 kuri passbook, the learned Magistrate found that the kuri had not been prized and that the amounts are due to the first respondent, as he has paid up twenty five instalments and that the amounts can be adjusted as against the amounts covered by Exhibit P1 and acquitted the accused holding that there is no legally enforceable debt.

6. Heard the learned counsel for the appellant and the Public Prosecutor for the second respondent. The first respondent has not entered appearance though served.

7. According to the court below, prizing of the kuri will find a place by way of endorsement

and seal in the kuri passbook and if that is not there, it has to be presumed that the kuri has not been prized. It is not that, in the kuri transaction, if the kuri passbook is lost, the prize amount will not be disbursed. We are in the dark as to whether the first respondent received the prize amount in the pretext that the kuri passbook is lost. Any way, the appellant does not advance any claim against the first respondent on the basis thereof and has stated that all amounts due under the kuri are deposited by the first respondent, who was a prized subscriber. According to the first respondent, Exhibit P1 cheque was being issued by way of security as directed by the appellant, when he borrowed an amount of Rupees five thousand before the termination of the kuri, when alone he would be entitled to return all the amounts he has paid up towards twenty five instalments under the kuri, as evidenced by Exhibit D1. One fails to understand how a signed blank

cheque will be issued by an unprized subscriber in a kuri, when he receives an amount of Rupees five thousand adjusting it against the paid up amounts under the kuri, in which, according to him, he has paid upto twenty five instalments, each instalment of which is Rs.2,500/-. In fact, the court below has not accepted the contentions so advanced by the first respondent. At the same time, he has found the first respondent not guilty and acquitted him, holding that there is no legally enforceable debt owed by the first respondent to the appellant and that what remains is a matter of adjustment of the amount covered by Exhibit P1 cheque, as against the amounts due to the first respondent under Exhibit D1. The approach made by the learned Magistrate cannot be justified, especially when he has not upheld the contention of the first respondent that Exhibit P1 cheque is one made up on a blank signed cheque leaf obtained from him by the appellant. On the evidence in the case, it cannot be held that

the first respondent/accused was able to rebut the presumption available in favour of the appellant under Section 139 of the Act, when the initial burden cast on the appellant/the payee of the cheque stands discharged by his testimony as PW1 and the production of Exhibits P1 to P6. In as much as the first respondent has not been able to substantiate his contention or at least rebut the presumption available in favour of the appellant under Section 139 of the Act, the case is one which falls within the sweep of Section 138 of the Act and the first respondent/accused should have been found guilty of the offence thereunder. The finding of the court below that Exhibit P1 cheque is not one issued in discharge of a legally enforceable debt and that the amounts due under Exhibit P1 cheque is only to be adjusted as against the amounts due to the first respondent under Exhibit D1 is illegal and perverse and acquittal of the first respondent entered into by the court

below, therefore, deserves to be set aside.

In the result, this appeal is allowed, setting aside the acquittal of the first respondent, vide judgment impugned and in reversal of the acquittal, I find the first respondent guilty of the offence under Section 138 of the Act; convict him thereunder and sentence him to undergo imprisonment for one day till rising of court and to pay an amount of Rupees forty six thousand by way of compensation to the appellant/complainant under Section 357(3) Cr.P.C. and in default to undergo simple imprisonment for a term of three months. The court below shall take steps to have the sentence enforced against the first respondent forthwith.

6th February, 2007 (K.P.Balachandran, Judge)

tkv